IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOHN RAYMOND SWEARINGEN,
Appellant.

No. 2 CA-CR 2017-0421
Filed October 31, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20152564001
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Eliza C. Ybarra, Assistant Attorney General, Phoenix
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Espinosa and Judge Eppich concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, John Swearingen was convicted of seven counts of sexual assault, seven counts of sexual abuse, and two counts of reckless abuse of a vulnerable adult. He was sentenced to concurrent and consecutive prison terms totaling 187 years. On appeal, Swearingen asserts the trial court erred by precluding testimony that it was not possible to evaluate whether the victim was capable of consent at the time of Swearingen's sexual offenses. He additionally argues he was not given adequate notice the state intended to seek aggravation of his sentences based on his prior convictions. We affirm.

¶2 Swearingen's convictions stem from his years of sexual contact with his legally blind, intellectually disabled, and mentally ill niece. Swearingen was arrested in 2015 after he had twice pushed the victim from his moving car when she refused to perform oral sex on him. Because Swearingen had recorded his sexual conduct with the twenty-one-year-old victim, the primary issue at trial was whether she had consented to the sexual acts.

¶3 On the third day of trial, Swearingen informed the trial court that he intended to cross-examine a psychiatrist who had treated the victim about the questions the psychiatrist would ask "somebody like [the victim]" to determine whether she was capable of consent, including "her understanding of sexual acts and whether or not she was attracted sexually to other individuals." The psychiatrist had not attempted to determine whether the victim was capable of consent and did not render an opinion on that question. Swearingen acknowledged the psychiatrist had explained that any opinion based on such questions "would be time sensitive," and, thus, if he had examined the victim "last week, all he would ever be able to opine was as of last week." After reviewing the psychiatrist's pretrial interview, the court determined questions about how the psychiatrist might have evaluated the victim's ability to consent were irrelevant because he

would have been unable to "render an opinion . . . whether that individual could have consented at a time in the past."

¶4 On appeal, Swearingen asserts the trial court erred in precluding the testimony as irrelevant. He argues the testimony is relevant because it would rebut testimony by an Arizona Adult Protective Services investigator that the victim functioned like a ten- or eleven-year-old child. Swearingen did not assert this basis for relevance below and, accordingly, has forfeited review for all but fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018).

¶5 In conducting fundamental-error review, we must first determine whether error occurred. *Id.* ¶ 21. Evidence is relevant only if "it has any tendency to make" a "fact . . . of consequence in determining the action" "more or less probable than it would be without the evidence." Ariz. R. Evid. 401. Swearingen has identified no connection between the investigator's opinion about the victim's approximate mental age—an opinion shared by Swearingen—and the fact that an evaluation of the victim's ability to consent would not be retrospective to the time of Swearingen's offenses. Nothing in the psychiatrist's pretrial interview establishes such a connection. Indeed, although the psychiatrist indicated in that interview that he had no opinion about the victim's "mental age functioning," he did not suggest the tests used to evaluate such functioning were valid only at the time of evaluation.[1] And the investigator did not testify that the victim's mental age made her incapable of consent. Thus, Swearingen has not established the precluded testimony was relevant.

¶6 Swearingen next asserts he was entitled to pretrial notice of the state's intent to allege his prior convictions as aggravating factors. His argument centers on Rule 13.5(a), Ariz. R. Crim. P., which permits the state, "[w]ithin the time limits of Rule 16.1(b), [Ariz. R. Crim. P.,]" to "amend an indictment, information, or complaint to add allegations of one or more prior convictions and other noncapital sentencing allegations that must be found by a jury." Swearingen argues that, because the state only alleged his prior convictions for the purpose of sentence enhancement, and not in support of an aggravated sentence, it did not comply with Rule 13.5(a). "[A] defendant should know the full extent of potential punishment before trial." *State ex rel. Smith v. Conn*, 209 Ariz. 195, ¶ 9 (App. 2004). The plain

[1]Swearingen asserts that the psychiatrist opined that tests about the victim's "intellectual age" would not be retrospective. The psychiatrist offered no such opinion.

language of Rule 13.5(a) requires only that the state timely allege the prior convictions. Swearingen has cited no authority, and we find none, that requires the state to additionally specify that the alleged prior convictions will support both enhancement and aggravation. And Swearingen was aware before trial that the state intended to seek an aggravated sentence.[2]

¶7 We affirm Swearingen's convictions and sentences.

[2]The state informed the trial court on the third day of trial that it was not "planning on presenting any aggravators" to the jury. That fact does not alter our conclusion that the state complied with Rule 13.5(a). And we reject Swearingen's argument that the notice here was defective because aggravating factors are effectively elements of an offense. Our supreme court has determined there is no constitutional right to notice of aggravating factors beyond that which is required by Arizona law, even if such factors are the "'functional equivalent' of an element of the offense." *McKaney v. Foreman*, 209 Ariz. 268, ¶¶ 15-16 (2004).